SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

v.

THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLANT.

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Woodbourne, N. Y.

THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4181—1963

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THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

Opinions Below.

The opinion of the court of original jurisdiction, Supreme Court, Special Term, Albany County, dated April 22, 1960 (R. 38-39) was not reported.

The opinion of the Appellate Division, dated August 1, 1961 (R. 43-45), was reported at 14 A. D. 2d 183, 217 N. Y. S. 2d 975.

The majority and minority opinions of the New York Court of Appeals dated January 25, 1962 (R. 46-52), were reported at 10 N. Y. 2d 522, 225 N. Y. S. 2d 210.

Jurisdiction.

The Court of Appeals held that the statute in question does not contravene the requirements of the due process clause of the 14th Amendment to the United States Constitution.

The jurisdiction of this Court was invoked under 28 U. S. Code, §1257 (2).

The notice of appeal to this Court from the order and judgment of the Court below was filed on February 13, 1962 (R. 57). The records from the New York Court of Appeals and the requisite Jurisdictional Statement were filed. Appellee moved to dismiss, and this Court noted probable jurisdiction by order dated April 30, 1962 (R. 59), reported at 82 S. Ct. 1029.

The Statute Involved.

Administrative Code of the City of New York, Title K41-8.0. NOTICE OF APPLICATION FOR APPOINTMENT OF COMMISSIONERS OF APPRAISAL.—The corporation counsel shall give notice in the city record, and in two public newspapers published in the City of New York and in two public newspapers published in each other county in which any real estate laid out on such maps may be located, and which it is proposed to acquire in the proceeding; of his intention to make application to such court for the appointment of commissioners of appraisal which notice shall specify the time and place of such application, shall briefly state the object of the applications and shall describe the real estate sought to be taken or affected. A statement of the real estate to be acquired or affected for the purpose of carrying out the said plan or plans or in any part thereof with separate enumerations of the numbers of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired, together with the route of the tunnels and aqueducts by courses and distances and of the greatest and least width of its required easement or parcel of land with a reference to the dates and places of filing such maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published, once in each week, in each

of such newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected. After the original appointment of commissioners of appraisal pursuant to the provisions of this article, the corporation counsel may apply at a Special Term of the Supreme Court in the same judicial district where application for such original commission was made for the appointment of a successor commission, upon first giving ten days' notice by advertisement in the newspapers herein above described of his intention to make such application.

(See New York City Charter and Administrative Code, Annotated, Vol. 5, pp. 558-559, 1957 ed., Williams Press, Inc.)

The Question Presented.

Is Title K41-8.0 of the Administrative Code of the City of New York unconstitutional on its face, and as applied in this case, in that it provides in a condemnation proceeding for notice which is entirely constructive, and fails to provide even minimum standards for such notice, despite the fact that the addresses of property owners whose properties are being taken are known, thereby taking from appellant in this case her real property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

Statement of the Case.

This is an appeal from an order and judgment of affirmance of the Court of Appeals of New York. The said order and judgment affirmed an order and judgment of

the Appellate Division of the New York Supreme Court which, in turn, had affirmed an order and judgment of Special Term of the said Court.

This is an action for an injunction brought by the plaintiff-appellant, who is the owner of a parcel of land and summer home riparian to the Neversink River, to enjoin the defendant from diverting the said river upstream from the plaintiff's property.

The basis of the complaint is that the appellee, in a condemnation proceeding, failed to acquire title, i. e., the right to divert the stream as against this appellant, this contention resting upon the appellant's claim that the notice provisions of the statute of condemnation in question were inadequate and far short of the due process requirements of the Federal and State Constitutions.

Appellant is one of a great number of property owners along the Neversink River who failed to file their claims for compensation within the three-year limitation of time simply because during said period, and until the institution of this suit, she had no notice of any kind and was completely ignorant of the acquisition by appellee of an interest in her property.

The appellee, in 1952, had brought a proceeding under Title K41 of the Administrative Code of the City of New York to acquire the right to divert the waters of the Neversink River at what is now the Neversink Dam in Sullivan County. In said proceeding an order was made at Special Term, dated March 14, 1952, granting to the City such right, and appointing commissioners of appraisal. The commissioners so appointed filed their oaths of office on June 9, 1952, the said date being the date of the taking (R. 8, 18).

It can be seen that the notice provided in the statute is entirely and purely constructive, that no form of personal or actual notice is required, nor was any in this case given.

The statute, in §18.0 (a) thereof (App. p. 42), provides a three-year limitation of time in which property owners may file claims, after which their claims are barred, in which event they may not receive any compensation whatever for the property taken from them.

This statute of limitations commenced to run on June 9, 1952, the date of the filing of the oaths of the commissioners, which is the date the City purported to acquire its title (Title K41-11.0 and 18.0, *set forth in the Appendix hereto*).

The City, however, did not commence to actually divert the river until on or about June 1, 1953 (R. 9).

The plaintiff was not at any time notified of the City's application, served with a summons, nor given any other personal notice of said proceeding (R. 9) and plaintiff had no knowledge of said proceeding, either constructive, actual or implied, prior to her retention of counsel in this action (R. 10).

The City still diverts the river, causing the plaintiff serious damage and decreasing the market value of her property (R. 9, 10).

Consequently this action in equity for an injunction was brought raising the question of title and placing the constitutionality of the notice provisions (Section 8.0 of Title K41) squarely in issue.

The notice given by appellee, in compliance with the letter of the statute, consisted of: Publication once a week for six weeks in the city record and two newspapers published in New York City, and two newspapers

published in Orange County where this property is located, the newspapers having been obviously deliberately selected to be those published many miles from the property affected, despite the availability of newspapers published in the vicinity of the properties; the posting of 22 notices, 19 on trees and 3 on poles, on both sides of the Neversink River along a 7 or 8 mile stretch thereof; the notice making no mention of any of the names of the persons affected, although each was known to appellee; the notice merely announcing the appellee's intention to apply on the return date for an order acquiring the right to divert and for the appointment of Commissioners; the notice containing no indication that action was required of any property owner; and the notice, dated January 10, 1952, having been published in January, calling for a March 14, 1952, return date, despite the fact that the great majority of the properties were known to be summer-occupied only.

As appellant had no notice or knowledge of this proceeding, she did not appear.

It might be pointed out that this is one of a great many cases presently pending in the various New York Courts and that the instant case is, so to speak, a "test case" on the question of the constitutionality of the said statute.

Should the appellant prevail in this action, the appellee would then be compelled to give proper notice and the appellant would have the opportunity to present her claim for determination to commissioners of appraisal.

Should the City prevail, the appellant and many others will have been deprived of their property without compensation of any kind.

Digest of Pleadings.

The Complaint (Rec. 7-12).

The complaint herein alleges the title of plaintiff from March, 1950, to the present (R. 7), describing said lands as consisting of approximately 3.5 acres of land with about 175 feet of frontage along the center of the Neversink River, upon which lands there is a dwelling (R. 7). It alleges further that the City commenced a proceeding prior to March 14, 1952, to acquire the right to divert the river upstream from the plaintiff's property and that subsequently an order was made at Special Term granting the City this right (R. 7). The complaint describes the fact that said proceeding taken by the defendant was under Title K41 of the Administrative Code of the City of New York, that maps were filed pursuant thereto designating plaintiff by name and her property as Parcel 424, Neversink Riparian Section #4 (R. 8); and that the said statute required notice by publication only (R. 8).

The complaint further states that plaintiff had no personal notice or knowledge of the taking, that she read none of the notices published (R. 9). The complaint then goes on to allege damage by the continuing trespass of the City (R. 9), without an adequate remedy at law and asks for an injunction (R. 11).

We deem the following paragraph of the complaint, *which is admitted by the City*, to be of important factual background for the determination of the constitutional question raised by the complaint (R. 10).

> "24. That in the said proceeding the defendant laid out five sections of the Neversink River from the site of the Neversink Dam to the confluence of the said river with the Delaware River into which the Neversink flows, numbering said sections 1 through 5 inclusive.

"That the amount of numbered parcels on the city's maps, and the number of mapped parcels designated which failed to file claims prior to the expiration of the Statute of Limitations are as follows:

Section Number	Number of Mapped Parcels	No. of Mapped Parcels Not Filing in Time
1	85	13
2	83	23
3	76	43
4	96	78
5	82	67
	431	224"

We ask the Court to disregard the arithmetical error in addition in the middle column where the total number of mapped parcels apparently should have been 422 instead of 431. (The difference involves some utility parcels not included.)

The complaint further points out in paragraph 26 that in addition to the numbered parcels there are upland parcels which are unnumbered also having rights to the river and that (par. 27) such upland parcels were not numbered by the City and are consequently not included in the mapping, and that (par. 28) there are a substantial number of these rights-of-way claims which likewise have not been filed in time (R. 11). Paragraphs 26, 27 and 28 *are also admitted* in appellee's answer.

The sole and only contention upon which the plaintiff claims her right to an injunction, is that she received no notice, and that the requirements of the Water Supply Act with regard to notice were inadequate and failed to comply with the Federal and State Constitutional requirements of due process of law (R. 11).

The Answer (Rec. 12-37).

The answer contains a series of formal denials of information and belief, admitting the allegations of no personal notice (par. VIII, R. 13) and denying outright only those allegations in paragraphs in the complaint alleging basically conclusions.

The prior proceedings under Title K41 are admitted.

Also, the figures with respect to the number of parcels and the number of unfiled claims *are admitted (supra)*, and the fact that, in addition to the said number of numbered parcels there are also unnumbered rights-of-way parcels, a substantial number of which failed to file claims in time, is also *admitted*.

The answer also contains three affirmative defenses. The first affirmative defense outlines all of the proceedings taken by the City of New York under Title K41, alleging compliance with the statute and the consequent acquisitions of title (the right to divert). It then concludes with an allegation that the action and any claim on behalf of the plaintiff is barred by the statute of limitations, Section K41-18.0 of the Administrative Code of the City of New York (R. 19, 20).

The second affirmative defense is that since the plaintiff failed to present a claim to the Comptroller of the City of New York for adjustment and a notice of intention to commence this action under Section 394a-1.0 of the Administrative Code and Section 50-e of the General Municipal Law that the action is barred (R. 20).

The third affirmative defense is to the effect that this action is barred by laches, in that the plaintiff failed to present a claim in time to commissioners of appraisal, in failing to serve a claim upon the City of New York, and

in failing to make demand upon the Comptroller of the City of New York before the commencement of this action, and in delaying the commencement of this action (R. 20).

The Reply (Rec. 37-38).

The reply admits the factual statements of the first affirmative defense but denies the legal conclusions thereof and denies the allegations of the second and third affirmative defenses (R. 37-38).

The Motion in Question.

The defendant moved, pursuant to Civil Practice Act, Section 476, and Rule 112 of the Rules of Civil Practice, for judgment on the pleadings and for a dismissal of the complaint.

Plaintiff cross-moved under Section 476 of the Civil Practice Act and Rule 109 (6) of the Rules of Civil Practice to dismiss all affirmative defenses, and under Section 476 and Rule 112 for judgment on the pleadings.

Special Term, by memorandum decision (R. 38-39), held that the notice provisions of Section K41-80 of the Water Supply Act were not violative of the due process provisions of the Federal and State Constitutions and accordingly granted the appellee's motion to dismiss the complaint, and denied the cross-motion. A judgment and order were entered thereon and an appeal taken to the Appellate Division, Third Department.

The Appellate Division held that "the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions" and affirmed (R. 43-45).

The New York Court of Appeals, by a 4-2 decision affirmed (R. 46-52).

The majority of the Court below relied upon the posting of handbills and the supposed visible effect of the diversion as providing such notice as would comply with due process, even though the statute provided no standards for the posting of handbills, nor did the pleadings even mention there being any so-called "apparent effect" of the diversion.

The minority of the said Court, Judge Dye writing the opinion in which Judge Van Voorhis concurred (R. 48-52), held that the publication of notices in distant newspapers having no circulation in the area of the properties taken, despite the availability of newspapers in nearby communities, together with the posting of handbills in remote places at a time when it was known that the properties would be vacant, failed to provide any reasonable notice; and that the statute in question was inherently defective in making no provision for personal service, nor any adequate substitute, even though personal service could have easily been made.

All the New York courts evidently disregarded the affirmative defenses as being insufficient in law, and reached and dealt with the constitutional question alone. Had the statute been held unconstitutional, the answer would have been dismissed on the cross-motion as per the opinion of Judges Dye and VanVoorhis.

Summary of Argument.

Appellant contends that the notice provisions of the statute in question fail to comply with the minimum requirements of due process of law. She rests this contention upon the undisputed fact that the statute providing

for notice to be given to property owners in the taking of their property in a condemnation proceeding provides for notice by publication alone, despite the fact that the names and addresses of the property owners are at hand.

The appellant further contends that this determination should rest upon the language of the statute itself, and that in making its determination the Court should not consider the possibility of there having been some form of other notice not provided in the statute that may have been fortuitously had.

It is also the position of the appellant that this record contains no indication that this appellant had any knowledge of any kind of the taking of her property within the limitation of time to file her claim, and that the Court should not go beyond the record and to assume that she was aware of the taking, which she strongly denies.

In presenting these arguments, the appellant shows to the Court the great injustices caused by the operation of this statute in its failure to provide notice.

If the statute falls short of due process and is repugnant to the Constitution, the appellee has failed to acquire its title. In such event, there would be a reversal of the order and judgment of the New York Court of Appeals, and, upon remand of the case, the New York courts would make provision for the payment to appellant of such compensation to which she is entitled under the applicable provisions of law.

ARGUMENT.

POINT I.

The notice provisions of Title K41-8.0 of the Administrative Code of the City of New York rely entirely on publication of notice to acquire private property, and contain no requirement for any form of personal notice. The statute is consequently inherently short of due process.

This United States Supreme Court has laid down a clear and unequivocal rule respecting the minimum requirements of notice in order for the same to comply with the constitutional requirement of due process.

We respectfully submit that this rule provides that due process of law requires, in the taking of private property, some form of personal notice, at least a letter, and that the absence of personal notice in a given situation can only be dispensed with where there is a compelling reason shown as to why it could not, in the particular given case, be had. We respectfully submit that the judgment of this Court in establishing such a rule is based upon the knowledge and practical experience that notice by publication is too often no notice at all, and that under the ordinary principles of fair play, some form of personal notice should be required, at the very least, a letter.

This principle was stated and re-affirmed over again in the *Mullane*, *Gillespie*, *City of New York*, *Walker* and *Wisconsin Electric Power Co.* cases to be cited hereafter.

Consequently a statute, particularly a condemnation statute involving the taking of known properties from known owners, which makes no provision whatever and is barren of any requirement for any form of personal notice is therefore inherently constitutionally defective.

The statute in question here relies entirely upon newspaper publication and a scattering of a few handbills over a great area to provide notice to property owners. The handbills cannot be considered a form of personal notice, as there are no specifications or even minimum standards for same, and they are not required for each property. Consequently, the handbills are merely another form of publication.

The handbills were not required to, and did not, contain the names of any of the persons affected, did not contain any reference to action that was required to be taken by property owners, nor did they indicate in the slightest that action was required of the property owners in order to ensure compensation.

Were a handbill to be posted on a conspicuous place on each individual parcel affected, such as a dwelling, appellee might argue that the same is substituted service. However, such is not the case here and, at best, the handbills were merely another form of publication.

The statute is consequently inherently defective.

It will be shown in this brief how the City of New York deliberately and conscientiously set about to acquire property without compensation. It will be shown how the appellee, working under this inadequate statute, deliberately hid the notices and tried as best they were able, to keep the taking of properties a secret from the property owners affected. After having succeeded to a considerable extent in so doing, the short statute of limitations for filing of claims was applied and the City took the position that no compensation whatever would be paid to those property owners who failed to file claims in time. We know that what has happened here will shock the sense of justice of this Court.

Yet, this unconscionable conduct on the part of the appellee municipality under this statute could only take place under a statute which permits it, and is merely indicative of the inadequacy of the statute.

In other words, the facts concerning the injustices resulting from this inadequate statute are highly illustrative of the consequences that can be had with a statute that fails to provide adequate notice.

It is our position here that even if these injustices had never resulted, that even if the City of New York had made an honest effort to publish in newspapers having circulation in the area of the taking, even if appellee had posted handbills on each property and in public places in the vicinity of the taking, that nevertheless, the statute would be unconstitutional for the reason that inherently, and by its own language, it falls far short of the minimum requirements of due process under the established case law.

We respectfully cite the case of *Mullane v. Central Hanover Bank & Trust Company*, 339 U. S. 306, 70 S. Ct. 652, 656, decided April 24, 1950. In this case the Supreme Court held unconstitutional a section of the Banking Law of the State of New York which permitted service by publication of a citation in a Surrogate Court proceeding, for the settlement of the accounts of a common trustee, where the identity of place of residence of the class of beneficiaries to be so served was known to the accounting trustee. Certain excerpts from that decision are of important significance:

> "(4) Quite difference from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they

require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

"(5) In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interest. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

• • • • • • •

"(7) • • • 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U. S. 385, 34 S. Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. • • •

"(8) An elementary and fundamental requirement of due process if any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457, 61 S. Ct. 339, 85 L. Ed. 278, 132 A. L. R. 1357; *Grannis v. Ordean*, 234 U. S. 385, 34 S. Ct. 779, 58 L. Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604, 34 S. Ct. 43, 58 L. Ed. 751; *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 4410, 44 L. Ed. 520. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean, supra*, and it must afford a reasonable

time for those interested to make their appearance, *Roller v. Holly, supra,* and *cf. Goodrich v. Ferris,* 214 U. S. 71, 29 S. Ct. 580, 53 L. Ed. 914. • • •

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. • • •

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through *local* newspapers. Chance alone brings to the attention of even a *local resident* an advertisement in small type inserted in the back pages of a newspaper and *if he makes his home outside the area of the newspaper's normal circulation* the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required *does not even name those whose attention it is supposed to attract,* and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

• • • • • • •

"(12) *As to known present beneficiaries of known place of residence, however, notice by publication stands on a different footing. Exceptions in the name of necessity do not sweep away the rule that within the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.*" (Italics added.)

Attention is called to the reference by the Court to the case where the notice "does not even name those whose attention it is supposed to attract," which is our case here. (See Notice, R. 21-22.)

Note also the reference to the situation where the person affected "makes his home outside the area of the newspaper's normal circulation," which is the situation here too, the newspaper publication in this case being at a different end of the county, and which will be discussed later in this brief.

This *Mullane* case established the rule that where names and addresses of interested parties were known, due process required more than notice by publication, at least the mailing of notice to the parties whose rights were affected.

Mullane caused much interest to legal writers, law revision commissions, and state legislatures.

36 Iowa L. Review 47 (1950);
39 Iowa L. Review 665 (1954);
100 U. Pennsylvania L. Review 305 (1952);
30 Mich. St. B. J. 12 (1951);
50 Mich. L. Review 124 (1951);
Perry "The Mullane Doctrine—a Reappraisal of Statutory Notice Requirements" Current Trends in State Legislation 32 at 118 (1952).

Of course, New York revised §100 (c) (12) of the Banking Law to require mailing.

A subsequent article in 39 Iowa L. Review 665 advised that North Carolina revised its N. C. Gen. Stat. §§1-98, *et seq.*, relating to publication and now requires mailing, and that Iowa (Iowa Rule 60, Rule 60.1 added) changed its statute to require mailing of notice or an affidavit that a diligent inquiry was made and that no address was found.

As a matter of fact the Iowa Law Review article above mentioned actually forecast the *Walker* case. At page 671 it mentioned the inadequacy of the Kansas statute in view of *Mullane!*

Mullane was followed by *Gillespie v. Fort Dodge, D., M. & S. Ry. Co.*, 203 F. 2d 119 (8th Cir., 1953), a bankruptcy case wherein notice by publication was held inadequate where actual notice was possible.

Also following *Mullane* was *City of New York v. New York, N. H. & H. R. R.*, 344 U. S. 293 (1953), in which the rationale of *Mullane* in point was affirmed.

In the most recent decision, the Court reaffirmed the rule laid down in the *Mullane* case. The Supreme Court struck down a Kansas statute which required in a condemnation proceeding, notice by either publication or personally, the notice actually given in the *Walker* case having been by publication. The Court said (*Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, 77 S. Ct. 200, December, 1956):

> "It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In *Mullane* we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. *In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.*" (Italics added.)

Walker is the most recent United States Supreme Court case on this question that we know of. It is of interest to know that the situation is more aggravated here and more deserving of relief than that situation existing in

said *Walker* case. In said case, Mr. Lee Walker's property was taken and commissioners met without his knowledge and made to him an award for his property in the amount of $725. Mr. Walker was not satisfied with said award when he learned of it, and sought resort to the courts.

In the instant case, Miss Schroeder received and shall receive nothing for her property, unless she prevails here.

At the same term of court with Walker was *Wisconsin Electric Power Co. v. Milwaukee,* 352 U. S. 948. This case was remanded on the same grounds as Walker. That case involved the levy of assessments by Milwaukee against owners of property abutting on a certain street, notice having been given by publication only, under the City charter. The complaint in a first action asking for cancellation of assessment on grounds of unconstitutionality of statute was dismissed on demurrer. The Supreme Court of Wisconsin, after *Mullane,* and because of an evenly divided Court, affirmed 263 Wisc. 111, 56 N. W. 2d 784.

After the decision of the U. S. Supreme Court in *City of New York v. New York, N. H. & H. Ry. Co., supra,* Wisconsin Electric started its action over again, for no new reason other than in view of the *City of New York* case reaffirming and strengthening *Mullane* it decided this time to go to the U. S. Supreme Court. Again a demurrer to the complaint was sustained in the Circuit Court, and on appeal the Wisconsin Supreme Court again affirmed, but this time only on the principle that there must be finality to litigation, and on the theory of "law of the case." 272 Wisc. 575, 76 N. W. 2d 341.

The U. S. Supreme Court remanded, 352 U. S. 948; order amended 352 U. S. 958; and the Supreme Court of Wisconsin reversed, 81 N. W. 2d 298.

The statute involved in the *Wisconsin* case was Section 11.20 of the Milwaukee City Charter Compilation of 1934, and required four days publication of the official papers in said city.

Subsequent to the reversal by this Court, the City of Milwaukee now proceeds under Section 66.60 of the Wisconsin Statute which requires as follows:

> "66.60 *Special assessments and charges.* • • •"
>
> "(7) • • • Such notice shall be given either by publication of a copy of the notice at least once in a newspaper published or having a general circulation in such city or village, or such notice shall be posted in not less than 5 public places within the city or village of which at least 3 shall be within the assessment district and a copy of such notice shall be mailed to every interested person whose post-office address is known, or can with reasonable diligence be ascertained, at least 10 days before the hearing or proceeding. • • •"

After the public hearing, if the plan is approved, the clerk is required to do as follows:

> "(8) (d) The city or village clerk shall publish the final resolution in a newspaper published or having a general circulation in said city or village, or such resolution shall be posted in not less than 5 public places within the city or village, of which at least 3 shall be within the assessment district and a copy of such resolution shall be mailed to every interested person whose post-office address is known, or can with reasonable diligence be ascertained."

It is, therefore, apparent that the interpretation given by the Wisconsin authorities to the rule in the *Walker* case is that more than publication is required, at least mailing to every interested person whose post-office address is known or can with reasonable diligence be ascertained.

We also call attention to the requirement in the above-quoted statute for the newspaper publication to be in a newspaper "published or having a general circulation in said city or village."

Under the statute questioned in the instant case, there is no such requirement except that the publication be in two newspapers published in the county where the properties are located.

Upstate New York counties are fairly large. Orange County has no less than 3 incorporated cities, Middletown, Port Jervis and Newburgh. Said county has 16 incorporated villages and numerous unincorporated hamlets. It is at least 50 to 60 road miles long and wide, generally, and spread out all over the entire county was a population of 152,255 persons as of the 1950 U. S. Census, and 183,734 persons as of the 1960 U. S. Census. The absence of a requirement in the statute to publish in newspapers having a circulation in the area of the taking was used by appellee to hide the newspaper notices in small newspapers in distant communities having no possible circulation in the area of the taking, despite the availability of newspapers with circulation in the area of the taking.

More than half of the property owners whose properties were mapped and numbered and whose names appeared on the maps prepared by appellee prior to this proceeding did not receive notice of the taking of their property.

Had the rule of law established by this court in the above cited cases been applied here, and had this statute contained the simple requirement for the mailing of notices, we believe there would have been few if any late filed claims.

It is, therefore, respectfully submitted that this statute is, on its face, inherently defective and should be so declared.

POINT II.

The learned New York Court of Appeals, in its majority opinion erred in applying the facts and stating the law in several important respects.

The criticism in this brief of the majority opinion of the New York Court of Appeals is made with the greatest respect for a truly great court, and we know that the faults expressed in this brief will be viewed in that light.

The court below failed completely to distinguish between the application being made at Special Term on March 14, 1952, and the proceedings subsequent thereto dealing with the filing of claims and the making of compensation to property owners.

The notice that was published in the newspapers commencing in January, 1952, and the 22 handbills posted on trees and poles on January 22, 1952 (R. 23), was merely a notice of motion. This notice is in this record on pages 21 and 22.

The Court will note that it is merely a notice of motion relating only to an application being made to acquire the right to divert the river, and for the Court to appoint commissioners of appraisal. It was returnable at Special Term on March 14, at which time any person interested had the right to appear and object to the taking. Obviously, it was not an *ex parte* application, but instead one made on notice. In fact, on the return date of the application made in Section #1, which is near the Neversink dam in Sullivan County, four attorneys appeared, submitted answers to the City's petition objecting to the taking of all of the water and the Court reserved decision. Subsequently a compromise was arrived at between the said attorneys representing various property owners and the Corporation Counsel of the ap-

pellee wherein the appellee agreed to make certain minimum releases from the dam into the river. That is the reason that the order of condemnation in all sections contain a decretal provision, which is the last paragraph of the order, directing the appellee to release three million gallons daily from November 1 through April 7, and ten million gallons daily from April 8 through October 31 in each year (R. 37).

It is only after this order of condemnation is made, and after the commissioners appointed in said order execute oaths of office which are filed in the county clerks' office that title vests, and the statute of limitations commences to run for the filing of claims.

Of course, nothing was done in the river at the time of the pendency of the application.

Consequently the only notice that could possibly have been properly considered by the Court below was the notice required by the statute itself. The reference in the opinion of Judge Fuld to visible effects of the actual diversion certainly have no bearing on the notice of the application for the order of condemnation, if it is at all relevant to any phase of this case. The fact that the notices tacked on trees and poles in January were on so-called "durable cloth" and may have been in certain instances readable for some time thereafter likewise is of no significance in that it was known that the properties affected were mainly summer occupied only.

Judge Dye, in the dissenting opinion said with respect to this:

> "The posting and publication were done in the month of January and although in compliance with the letter of the statute such publication and posting in such remote places at a time when it was known that the subject premises would be vacant, it seems to me fail to comply with its spirit and

intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated any reasonable opportunity of knowing that such a proceeding was pending" (R. 50).

This appellant had the right to appear on the return date of the application at Special Term, and to object to the taking, had she known of the proceedings. This right is separate and apart from the right to compensation for the taking of her property. Yet, the Court below failed to distinguish this as a separate and distinct right, considering only her right to file a claim. Had the learned Court considered this separate important right, it could not have very well considered to be of great "significance" the assumption of the so-called apparent effect of the diversion, which diversion occurred more than a year *after* her right was gone.

The footnote to Judge Fuld's opinion dealing with newspaper notice in this instance and excusing the publication in distant newspapers on the grounds that no newspaper is published in the particular community where this property is located must have been lightly made. Since the properties involved in this particular condemnation are necessarily along a river in a rural area, it would indeed be too much to expect to find a newspaper published in each hamlet or community through which the river runs. The absence of a newspaper published in the community in which Miss Schroeder's property is located does not justify by any means publication in the far ends of the county in newspapers which are known to have no circulation whatever in the taking area, where it is a matter of public knowledge that the City of Port Jervis, seven miles from the property, has a large newspaper circulating in the area of the taking, and the City of Middletown, eight miles away, also has a newspaper circulating in the area of the taking. Yet these two newspapers were by-

passed for safe newspapers where the appellee had excellent reason to believe they would not be seen by any property owners in the area of the taking.

If there were a taking, for example, in Arlington, Virginia, and if Arlington had no newspaper published therein but was covered by Washington newspapers, could publication in a Philadelphia newspaper be justified to provide notice to property owners in Arlington?

It is further respectfully submitted that the Court of Appeals improperly distinguished this case from *Mullane* on the grounds that the instant case deals with real property and Mullane dealt with less tangible property. The Court overlooked the fact that *Walker* also involved the taking of real property.

It is respectfully submitted that the Court below made a distinction without a difference. The constitution does not distinguish between property real and personal, tangible and intangible. So long as it is property, it cannot be taken without due process of law, an essential ingredient of which is adequate notice consistent with the American principles of fair play.

We further respectfully point out to this Court that the majority of the court below erroneously assumed that the effects of the diversion were visible at the Schroeder property, long before the expiration of the statutes of limitations to file claims and that this constituted a sort of extra-statutory notice that cured the statutory defects. This reliance by the learned Court upon such an assumed fact was in the language of Judge Fuld "of considerable significance." There should be no doubt but that the reliance by the Court of Appeals upon this assumption was of great importance in its determination of whether or not this statute complied with due process.

This, the Court should not have done for many reasons.

Firstly, it has already been mentioned that this could not possibly have been a consideration with respect to notice of the application to appoint commissioners returnable March 14th, 1952, as it occurred later.

Secondly, this is and was an appeal from an order and judgment made on a motion addressed to the pleadings.

The motion and cross-motion here were both made under Rule 112 of the New York Rules of Civil Practice (R. 5, 6).

Such a motion addressed to the pleadings is equivalent to the common-law demurrer and the factual allegations, for the purposes of the motion, are deemed true. Affidavits are not used for this reason on such motions, the only papers on such a motion being the Notice of Motion, and the pleadings.

By way of explanation, the affidavits annexed to appellee's answer were exhibits which were part of the answer, and were not separate affidavits used on this motion.

The same is true of Section 476 of the New York Civil Practice Act (*Gordon v. N. Y. Institute of Optics*, 1950, 277 App. Div. 1100, 101 N. Y. S. 2d 192), the same also being true of Rule 109 (6) of the New York Rules of Civil Practice (*Landefeld v. Seibert*, 1959, 8 A. D. 2d 973, 190 N. Y. S. 2d 832).

Consequently, the learned Court below should not have assumed the truth of a fact, no reference to which was made in the pleadings, and which alleged fact was strongly disputed by both sides in the briefs.

The appellee in its answer does not allege that effects of the diversion were visible in this case. If it had it would have been denied in the reply.

A study of the figures of late-filed claims strongly shows the truth of appellant's position.

For example, Section 1 consists of approximately the first seven or eight miles of river downstream from the dam. This close to the dam the effects of the diversion, nearly 100%, are more apparent. In this section only 13 out of 85 owners of numbered parcels or about 15% failed to file in time. However, in Section 2 further downstream, 23 out of 83 owners of numbered parcels, or approximately 28%, failed to file in time. In Section #3, 43 out of 76 owners, or approximately 59%, failed to file in time; in Section #4, where the Schroeder property is located, 78 out of 96 or approximately 81% failed to file in time; and in Section #5, which is the last seven or eight-mile section of the Neversink River into its confluence with the Delaware, 67 out of 82 owners, also 81%, failed to file in time.

It is therefore apparent that there is a grain of truth in the Court's contention concerning the apparent effect of the diversion, but not much more. These figures prove appellant's contention that as one goes further downstream the effects of the diversion are less visible.

The reason is that as the stream winds and turns in its travels to the Delaware River, about 35 miles below the dam, it picks up substantial quantities of water from its tributaries and from ground water in the drainage area of the stream, so that as one travels further downstream the percentage of diversion decreases, the same at the Schroeder property being in the neighborhood of a 50% diversion.

The diversion of a percentage of the stream, even a very high percentage of the stream, does not necessarily substantially lower the height of the stream. The most drastic effect of the diversion is its decrease in velocity of flow.

For example, a natural pool in the river will be full, whether there are 30 million gallons per day coming into it, or 300 million gallons per day. The thing that changes in such an instance is its velocity.

Prior to the diversion, the Neversink was known as a "flashy" stream and on the average of once a year reached flood stage in varying degrees. This high quantity of water scoured and cleansed the bottom of the stream to its natural sand and gravel stone bed.

In its natural condition its temperature was cool at its headwaters and normal in the rest of the stream. The diversion has impounded the waters in the Neversink Reservoir. Under the taking order of March, 1952, minimum releases must be made. However, under the United States Supreme Court decree appointing a River Master, a formula was established whereby when the water in the Delaware River at Montague, New Jersey, falls below a certain point, the City must release additional quantities from its reservoirs. The result of the foregoing is that at times the City releases the minimal quantities from the reservoir at Neversink and at times very substantial quantities.

The waters released are through the bottom of the dam, the temperature being approximately 39.2 degrees F. at the release works.

Consequently, when the releases are high the temperature in the river for many miles downstream is very low. On the other hand, when the releases are low, because of small quantities and velocity of flow the temperature in the river is unusually high. This situation is drastic to fish life, native trout having been practically eliminated from the stream.

The decrease in velocity, although not necessarily decreasing the depth, has reduced the carrying capacity of the stream, silt and sedimentation have coated the stream

bottom; algae is most proliferous. The freshets or floods being absent, this accumulation on the bottom continues to build up over the long period of years. Fishing is destroyed. Bathing and swimming made more and more uncomfortable as time goes on.

Yet a layman, having no understanding of the technical reasons for the effects of the diversion and looking only at the height of the stream, knowing that the stream fluctuated greatly in its natural pre-diversion state, at a point 25 miles downstream from the dam in a different county, as at the subject property, could not be expected to conclude at a glance that there had been an artificial diversion by the City of New York for water supply purposes for which he was entitled to be compensated.

The suggestion contained in a footnote to the opinion of Judge Fuld to the effect that the great number of claims not filed in time may possibly have been due to a lack of interest, is truly the grossest speculation. We respectfully submit that the Court below should not have so indulged, particularly since the known facts clearly point out the contrary.

If a property owner files a claim, but such claim is late, does this show that he has no interest in what has occurred?

There are a great number of cases involving late filed claims under this statute involving this same Neversink diversion in the lower courts in New York. Two of these cases, *Matter of Huie (Nielsen)*, 6 A. D. 2d 837, 176 N. Y. S. 2d 193, and *Matter of Huie (Riehle)*, 6 A. D. 2d 838, 176 N. Y. S. 2d 197, are representative cases which in themselves involve a large number of claims. There are many more which this writer and the appellee knows of that have been decided at Special Terms, and Appellate Divisions, appeals taken and which are lying dormant waiting for the outcome of this Schroeder case.

We have estimated that the total number of claims actually filed but late, and pending, was about 200. This was contended before the New York Court of Appeals, and before this Court on the question of jurisdiction. The appellee knows exactly how many late filed claims are pending, because claims are filed with the Law Department of the appellee. Yet, the appellee has never come forth and said, for example, that there were not 200 claims but only 100. It could tell us exactly how many there are. Considering the unnumbered parcels which do not appear on the City's maps and which were treated by appellee as if they were not in existence at all, our estimate of late-filed claims may be very low.

We have spoken of claims actually filed being late, but how many more are there which were never filed late because the claimants enquired of the Law Department and were told that it was too late and who never consulted counsel?

The very fact that there are so many of these aggrieved property owners who have their cases in the courts is, in and of itself, the clearest proof that the speculation concerning lack of interest by the learned Court of Appeals was cruel and unwarranted. It is also, we respectfully add, irrelevant.

The footnote to Judge Fuld's opinion that the handbills were printed with permanent ink on durable cloth about 28" long and 18" wide and were firmly affixed and that "they undoubtedly remain legible for years" was not relevant and certainly gave the appellee the benefit of many doubts in taking private property.

There is nothing in the statute that prescribes the material on which the handbills are to be printed nor the type of ink, nor the size. The assumption that these handbills

would withstand the rigors of snow, sleet, ice and rain, being removed by persons or animals is unwarranted, if it is at all relevant in the first place.

The outstanding and the most glaring error found in the reasoning of the majority of the Court of Appeals, shown by its assumption of facts as mentioned above, was in its going beyond the statute to determine its constitutionality.

We respectfully submit that a case that is controlling in this situation is *Wuchter v. Pizzuti*, 276 U. S. 13 (1928).

This case held that extra-statutory notice could not supply constitutional validity to a defective statute.

In the *Wuchter* case there was an automobile accident on a New Jersey highway. The New Jersey statute provided that any nonresident using its highways automatically designated the Secretary of State as agent for service of process. There was no provision in the statute for the Secretary of State to notify the nonresident by mail of this action.

The action was commenced by service upon the Secretary of the State and a judgment interlocutory was taken and a writ of inquiry as to damages was issued.

Although the statute did not require it, notice of its proposed execution, prior to final judgment, was actually served on Wuchter in Pennsylvania, but Wuchter did not appear in the proceeding and final judgment was entered.

The United States Supreme Court held that the appointment of the Secretary of State as agent was allowable under *Hess v. Pawloski*, 274 U. S. 352, but that the statute should have provided for mailing of notice by the Secretary of State to the defendant.

The fact that the defendant did actually receive notice was held to be irrelevant, the Court stating as follows:

"But it is said that the defendant here had actual notice by service out of New Jersey in Pennsylvania. He did not, however, appear in the cause and such notice was not required by Statute. Not having been directed by the statute, it cannot therefore, supply constitutional validity to the statute or to service under it, *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 424, 425; *Louisville and Nashville R. R. Co. v. Stock Yards Company*, 212 U. S. 132, 144; *Central of Georgia Ry. Co. v. Wright*, 207 U. S. 127, 138; *Security Trust Co. v. Lexington*, 203 U. S. 323, 333; *Roller v. Holly*, 176 U. S. 398, 409; *Stu... v. Palmer*, 74 N. Y. 183, 188; *Berryhill v. Sepp*, 106 Minn. 458."

We have Shepardized the *Wuchter* case and find that it is still the law today, as it should be.

The only exceptions to the *Wuchter* rule are where there has been an appearance in the proceedings, and the only other exception being in the situation where the state courts have construed the statute to require actual notice. Neither is the case here.

Although it is correct that Justices Holmes and Brandeis dissented, and Mr. Justice Stone dissented upon other grounds, it is still good and practical law today. In fact, *Wuchter* was cited as authority in the *Walker, supra*, case in 1956.

Its rationale rests upon the thesis that we live under a government of law, and not by the grace of man. It follows, therefore, that a statute which may deprive a person of his life, liberty, or his property, must contain within itself the necessary safeguards to guarantee due process of law, and not leave the slightest necessary safeguard to chance or to the caprice of men.

It is respectfully submitted that this great principle has been time and again expressed in the following cases:

In the case of *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), this Court said on page 424:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the Court said:
>
> "'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and then opportunity to be heard.'
>
> "The soundness of this doctrine has repeatedly been recognized by this Court. Thus, in *Security Trust & S. B. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. Ed. 204, 208, 27 Sup. Ct. Rep. 87, the Court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes:
>
> "'If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is whether any notice is provided for by the statute (*Stuart v. Palmer*, 74 N. Y. 183).'
>
> "So, in *Central of Georgia R. Co. v. Wright*, 207 U. S. 127, 138, 52 L. Ed. 134, 151, 28 Sup. Ct. Rep. 47, the Court said:
>
> "'This notice must be provided as an essential part of the statutory provision, and not awarded as a mere matter of favor or grace.' • • • and in *Louisville & N. R. Co. v. Central Stock Yards Co.*, 212 U. S. 132, 144, 53 L. Ed. 441, 446, 29 Sup. Ct. Rep. 246, it was said:

"'The law itself must save the parties' rights and not leave them to the discretion of the Courts as such.'"

It is respectfully submitted that the Court of Appeals in this case cannot be affirmed without overruling the *Wuchter* case and the long line of distinguished cases cited that came before it.

The City of New York would here stand on higher moral ground in asking this Court to overrule *Wuchter* had it made the slightest attempt to apprise as many property owners as possible of the proceedings. Had the appellee mailed notices or ordinary letters to the property owners, had they published in newspapers having circulation in the areas affected; had they published their notices in stores, post offices, garages and other public places in the areas of the taking instead of on trees and poles along the river, had they made the slightest attempt to follow the spirit as well as the letter of the statute, it might invoke some sympathy in its behalf. However, in view of its conduct here, there is no moral armament for its onslaught against the *Wuchter* rule.

If this statute is upheld in this case, the next condemnation by appellee may have a diversion take place after the expiration of the statute of limitations. This is not a speculation. To buttress the existence of this possibility, we point out that in the case of the appellee's diversion of the Rondout, it acquired the right to divert on May 6, 1941, and the date of the actual diversion was April 3, 1944, just one month short of the expiration of the statute of limitations to file claims. If this instant case had involved the Rondout taking instead of Neversink, what type of actual notice could the Court of Appeals have relied on other than the entirely constructive notice of the statute itself?

The statute nowheres requires the City to act upon acquiring title. It could, in any situation, wait more than three years (having waited two years and 11 months in the Rondout case) before physically taking the property.

In the instant case, the City divided the 35 miles of river into five sections. This was arbitrarily done, the statute containing no limitations. Appellee could have divided the 35-mile stretch of river into only two sections, using only 20 handbills in each such section. The statute contains no requirement as to the size of the handbill, nor of the material to be used. There is, consequently, no prohibition against the use of legal size onion skin paper so common in foreclosure and election notices.

It is known, however, that appellee could not have done much worse on the newspaper notices, having already shown its inclination to select those most distant from the property but still within the boundaries of the county.

It is therefore respectfully submitted that the *Wuchter* case should be followed, and not overruled. The statute should, in its own language, contain the necessary minimum safeguards to ensure due process of law in its operation. Notice, which is such an essential ingredient of due process, should be provided in the statute itself, and not left to a fortuitous circumstance, nor to the grace or favor of the user of the statute.

The instant case is stronger than *Wuchter* for the reason that actual notice by mailing was had in *Wuchter*, while no notice was had here except for what the Court below erroneously assumed to be an apparent effect of the diversion.

POINT III.

The appellee deliberately took advantage of this defective statute to acquire property without compensation.

Judge Dye, in his dissent in the court below, stated:

> "If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected" (R. 51-52).

This statement was not made lightly.

This brief has already made mention of the bypassing of the newspapers in Port Jervis and Middletown, seven and eight miles respectively, from the subject property, and with circulation in the area of the subject property, for distant newspapers.

The appellee will not deny, as the County Clerk's records show, that the newspaper publications in Orange County were made in the Chester Bulletin of Chester, New York, and the Valley Dispatch of Warwick, New York.

The Orange County Data Book for 1962, published by the Orange County Planning Department, County Building, Goshen, New York, lists the circulation figures for the newspapers with which we are here concerned. The Union Gazette (Port Jervis) has a circulation of 4,000; the Middletown Record, 24,900; the Warwick Valley Dispatch, 3,000; and the Orange County Post, 3,000. The Middletown Record was, in 1952, the Middletown Times Herald with a circulation probably lower than the above figure. However, the Chester Bulletin used in 1952, is no longer in existence and undoubtedly had a smaller circulation than the figure for the Orange County Post, published in Washingtonville, N. Y., covering said community and Chester and Florida, N. Y.

A glance at any responsible highway map of New York State would promptly show that the Chester and Warwick papers could certainly not be expected to have any circulation in the taking area, said communities being 30 to 40 road miles from this property.

This is not an isolated, unusual, circumstance. In adjoining Sullivan County, publication was had in the Liberty Adviser, the newspaper of the least circulation in Liberty, New York, and also in the Sullivan County Democrat, published in the far western Sullivan County hamlet of Callicoon, New York. The above places of publication are matters of public record, as affidavits of publication are on file in the respective County Clerk's offices, which the appellee will certainly not deny.

Section #3 is in Sullivan County and is just east of Monticello, New York, the county seat, which has no less than three newspapers published therein, all of which were bypassed for "safe" newspapers of limited circulation, having no circulation whatever in the area of the taking.

With respect to the handbills, let us just look at Section #4 which contains the subject property. In said section, there are 96 numbered river front parcels, and a great many upland parcels with deed rights-of-way across numbered parcels to the river, which upland parcels are not shown on any map and which property rights were treated by appellee as if they did not even exist. For example, in Section #4, there is located a development known as Meyers Grove which has in the neighborhood of 100 properties, all of which have deed rights to bathe, swim and fish in the Neversink River. In fact, the case of *Application of Huie (Nielsen), supra*, involves a great many of these Meyers Grove properties.

For all of these properties, appellee posted 19 handbills on trees and three on poles, said posting having been done on January 22, 1952 (R. 23).

Since the Neversink River Valley had been developed as a summer resort area, it was known that most properties would be vacant at that time of year.

It should not be disputed but that appellee intended even the handbills to attract as little attention as possible. This is apparent from the following facts:

Section #4 runs through the Hamlets of Cuddebackville, Huguenot and Godeffroy (see Map, Exhibit A, annexed to Answer, in the Exhibit File).

Cuddebackville has a post office, a fire house, a Town Clerk's office, a school, at least two general stores, as well as a church and several gas stations.

Huguenot has a post office, a Grange Hall, a municipal building and office and general stores.

Godeffroy also has a post office, general store, and a gas station.

Yet, not one handbill was posted in any of these public places!

It is respectfully submitted that any design to attract attention to the handbills would have utilized these places where the posters could have been sheltered from the weather and seen and read by at least those few year-round residents who would trade and socialize at these places.

Instead, the City posted as it did on trees and poles along lanes, dirt roads in the forest and a highway which certainly at the time of year in question would not accomplish the purpose of giving notice. In fact, the notice could not be read from a passing automobile and in order to be read, would require people to walk off the road onto private property, if, in the first place, the notice could be distinguished from the ordinary "No Trespassing, Hunting or Fishing" signs.

This type of notice may have accomplished its purpose in 1905, the year the statute was enacted. However, by 1952, Orange County and also Sullivan County have absorbed the impact of the summer vacationist and summer resident from the great metropolitan areas of New York City and vicinity. Together with the very substantial growth of population, came the increase in the number of communities and certainly the number of newspapers. It is reasonable to say that a notice stuck on a tree in January of 1952 received far less note and comment than it would have in 1905.

Yet, the appellee made no concession to the changing times. It knew the names and addresses of the owners of the properties along the river that it had mapped, and disdained to even send them a letter. It worked quietly and effectively with tongue in cheek, giving only the minimum notice required by the letter of the statute, and awaited the expiration of the statute of limitations.

CONCLUSION.

It is the position of appellant that her property was taken from her without compensation and without due process of law.

It is her position that this came about by reason of the failure of the statute in question to provide for any form of personal notice, said statute relying entirely on notice by publication.

It is also the contention of appellant that the holding of constitutionality by the New York Court of Appeals could not possibly be reconciled with the cases heretofore decided by this Court and mentioned in this brief, the said Court having looked beyond the language of the statute to consider and speculate with respect to other notice that may have fortuitously occurred.

It is also the contention of the appellant that the great number of property owners who have been deprived of their property without compensation in the Neversink proceeding is a shocking commentary upon the practical workability of this defective statute.

Appellant realizes that she cannot interfere with nor does she actually seek to interfere with the appellee's water supply system. However, she does feel that she is entitled to her day in court so that she could file her claim for compensation and be heard as to the extent of her damages.

Consequently, the appellant requests that this Court hold the statute in question unconstitutional and reverse the order (remittitur) and judgment of affirmance of the Court below.

Respectfully submitted,

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Woodbourne, New York.

APPENDIX.

Title K41-11.0, Administrative Code of City of New York:

> Vesting of title; possession; removal of buildings or improvements.—On Filing such oaths, in the manner provided in section K41-10.0 of the code, the city shall be and become seized in fee of all those parcels of real estate which are on the maps referred to in section K41-5.0 of the code delineated as parcels, of which it has been determined that the fee should be acquired, and shall also be and become vested of the easements, in, over, upon or through all those other parcels of real estate which are on said maps delineated as parcels in, over, upon or through which it has been determined that easements should be acquired; • • •

Title K41-18.0, Administrative Code of City of New York:

> Limitation of time for presenting claims.—All claims of every name and nature under this article, except claims provided for under section K41-22.0, must be exhibited and presented to the commissioners of appraisal having jurisdiction of the same within the following periods of time:
>
> (a) in the case of real estate acquired in fee or in which an easement is acquired, within three years after title thereto shall have become vested in the city;
>
> (b) • • •
>
> In the case of real estate acquired in fee or in which an easement is acquired, every person neglecting or refusing to present a claim within such time shall be deemed to have surrendered his

interest in such real estate or his claims for damages thereto, except so far as he may be entitled as an owner of, or person interested in the award, if any, made by the commissioners of appraisal. All other claims not exhibited and presented within the time above specified shall be forever barred.

New York Civil Practice Act, Section 476:

§476. Judgment on pleadings or admission of part of cause.

Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require.

New York Rules of Civil Practice, Rule 112:

Rule 112. Motion for judgment on the pleadings after issue joined.

If either party be entitled to judgment on the pleadings, the court may on motion, give judgment accordingly, and without regard to which party makes the motion.

New York Rules of Civil Practice, Rule 109 (6):

Rule 109. Plaintiff's motion on the answer.

After the ser . of an answer, the plaintiff may serve notice c tion to dismiss a counterclaim or strike out a . fense consisting of new matter contained therein, where one or more of the following defects appear on the face thereof:

1. • • •

2. • • •

3. • • •

4. • • •

5. • • •

6. That the defense consisting of new matter is insufficient in law.

If upon a motion made pursuant to this subdivision, it shall appear that the complaint does not state facts sufficient to constitute a cause of action, the court hearing the motion may dismiss the complaint, and in its discretion allow the plaintiff to amend the complaint upon such terms as are just, even in the absence of a cross-motion therefor.

A notice of motion specifying an objection set forth in subdivisions 2, 3 or 4 hereof shall be served within twenty days after the service of the answer. A notice of motion specifying an objection set forth in subdivisions 1, 5 or 6 hereof may be served at any time prior to the trial. • • •